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In The

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1134

GREGORY PAUL NOONAN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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GREGORY PAUL NOONAN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on November 18, 1970.

OPINIONS BELOW

The decision of the Court of Appeals is not yet reported. It is set out in the Appendix, *infra*, at pp. 14a-30a. The decision of the District Court is likewise unreported and is set out in the Appendix at pp. 1a-13a.

JURISDICTION

The judgment of the Court of Appeals was entered November 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Petitioner, a nineteen year old 1-A Selective Service registrant, was ordered to report for induction on March 25, 1968, six days prior to his twentieth birthday. He reported as ordered but refused to submit to induction. Petitioner was convicted in the District Court, appealed, and the conviction was reversed in April, 1970. An application for rehearing was filed by the Government, granted, and the opinion withdrawn. Following re-argument, the conviction was sustained by a panel which had been reconstituted by reason of the death of one of the judges who had participated in the original decision. Two issues are presented by this petition:

I. Where the policy of the Government is to permit a registrant who has violated the Military Selective Service Act of 1967 by failing to submit to induction to accept induction and dismiss the criminal charges, is it a denial of equal protection not to accord similar rights to the registrant who, after committing the same offense, seeks to perform alternative service if found entitled to conscientious objector status?

II. Where the defendant in a prosecution for failure to submit to induction has raised the question of whether he was called in order by showing that statu-

tory and regulatory provisions relating to order of call have not been complied with, does the burden shift to the Government to prove that the registrant was called in order?

STATUTES AND REGULATIONS INVOLVED

Military Selective Service Act of 1967, Sections 5 and 12; 50 U.S.C. App. Sections 455, 462 are set forth in the Appendix, *infra*, pp. 21a-23a.

Selective Service Regulations 1625.2, 1625.3; 32 C.F.R. Sections 1625.2, 1625.3 are set forth in the Appendix, *infra*, pp. 24a-25a.

STATEMENT OF THE CASE

Petitioner, a registrant with Selective Service System Local Board 10, Pittsburgh, Pennsylvania, was originally given a II-S deferment based on his status as a student. During the fall term of 1967 he withdrew from Pennsylvania State University and on December 14, 1967 was reclassified 1-A. Petitioner did not appeal this classification.

Thereafter, he was found acceptable for military service, and ordered to report for induction on March 25, 1968, six days prior to his twentieth birthday. He reported as directed, but refused to submit to induction. On June 26, 1968 he was indicted for violation of Section 12a of the Military Selective Service Act of 1967, 50 U.S.C. App. 462(a).

On trial in the District Court, petitioner contended he had been deprived of procedural due process by the manner in which his application for a I-O classification (conscientious objector) had been processed. On advice of counsel, following refusal of induction, petitioner, on May 29, 1968, requested a Form 150. The form furnished failed to reflect legislative changes made by the Military Selective Service Act of 1967, as a result of this Court's decision in *U.S. v. Seeger*, 380 U.S. 163 and petitioner testified at trial he was unable to answer the questions relating to a "Supreme Being" (Tr. 143). Sometime later he talked to a draft counselor, who interpreted the form for him in such a way that he felt he could answer the questions (Tr. 150). He filed Form 150 on September 20, 1968.

State Selective Service Headquarters advised the Local Board to give petitioner an interview and authorized consideration of the C.O. claim without regard to whether there had been a change in petitioner's status resulting from circumstances beyond his control, as required by 32 C.F.R. 1625.2 in the case of late claims. State Headquarters further advised that the claim should be considered "without regard to the fact that he has been indicted and without the aurora [sic] of criminality". The Local Board gave petitioner an interview and refused to reopen the case. Petitioner sought to appeal but was informed he had no right to do so because his classification had not been reopened.

Petitioner also raised in the District Court the question of whether he had been ordered to report for induction in accordance with the then-mandated order of call, under which 1-A non-volunteers in the age group 19-26 were to be called "in order of their dates of birth with the oldest being selected first." 32 C.F.R. 1631.7. At trial, petitioner offered evidence that in determining the quotas for Local Boards, no direct credit was given for residents of the area then in the Armed Forces and, further, that after the quotas had been fixed, no credit was given against the Local Board quota for men who enlisted. Such credits are required by 50 U.S.C. App. 455. Petitioner also showed that the Local Board followed a practice of deferring physical examinations of registrants classified 1-A or 1-A-O who had personal appearances or appeals pending, a practice which the lower court said apparently did not comport with the regulations. Petitioner contended that these irregularities accelerated his induction and deprived him of the

right to be called in order. The trial court held he had not met the burden of proving prejudice.

Petitioner was convicted and sentenced to three years imprisonment. The case was argued in the Court of Appeals on January 6, 1970, before a panel consisting of Judges Biggs, Aldisert and Stahl. On April 6, 1970, the Court reversed the conviction, based on the theory that the denial of procedural due process in connection with petitioner's late C.O. claim invalidated his conviction.

Rehearing was sought by the Government and granted solely for consideration of the question of whether a denial of procedural due process in connection with a post-induction-date claim for classification as a conscientious objector could invalidate an induction order retroactively. The case was reargued September 28, 1970 before Judges Biggs, Van Dusen and Aldisert, the panel having been reconstituted by reason of the death of Judge Stahl. The Court affirmed the conviction, holding that petitioner's attempt to reopen his classification two months after he had refused to submit to induction could not be converted into a legal defense to the crime he had already committed. The court also rejected petitioner's order of call question, which it had not reached in the first decision, based upon the lower court's disposition of the issue.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because it involves two issues of federal constitutional and statutory law which have not been previously considered by this Court. Both are issues on which the law is unclear and decisions in the Circuits are in conflict. Additionally, the issues are of importance not only to this petitioner, but to others whose claims of conscientious objection the Selective Service System deems worthy of consideration even after the induction date has passed. The decision of the Court below negates powers granted to the Selective Service System by the regulations and precludes administrative correction of injustices and inequities in the case of registrants claiming conscientious objection status after they have refused induction.

1. The policy of the Government is to permit a registrant who has failed to report and/or submit to induction to change his mind and accept induction even after an indictment has been returned. The indictment is then dismissed by the Court. Petitioner contends that it is a denial of equal protection not to accord similar rights to the registrant who seeks to perform alternative service and have his indictment dismissed.

In the case of individuals in the first category, the registrant, with the consent of the United States Attorney, may be ordered for induction after prosecution has commenced. If the delinquent registrant submits to induction, or is found disqualified for military service, the Department of Justice requests the court to dismiss the indictment. Dismissal is granted routinely. The reason for this policy is that "the purpose of the law is

to provide men for the military establishment rather than for the penitentiaries."*

Equal protection obviously requires that a delinquent registrant who claims he is a conscientious objector be afforded the same opportunity to render service to his country and thus escape criminal liability. In the C.O.'s case, there must first be a determination that he is, in fact, a conscientious objector and hence entitled to perform alternative service. Selective Service Regulations provide a process by which this determination can be made. Under 32 CFR 1625.2 the Local Board may reopen and classify the registrant anew if it first finds that his status has changed by reason of circumstances beyond his control. Under 32 CFR 1625.3 the State Director may, in his discretion, authorize the local board to consider the C.O. claim on its merits, free from the strictures of R. 1625.2. If the delinquent registrant is classified I-O, there is no problem — he can be ordered to report for alternative service, and have his indictment dismissed. The fact that the decision as to whether he is a conscientious objector must be made by a government agency other than the courts is of no significance. The same thing occurs when the delinquent registrant who is not a conscientious objector fails his physical examination at the Armed Forces Examining and Entrance Station, as a result of which the indictment is dismissed.

According equal protection to the delinquent registrant who claims conscientious objection becomes difficult only in cases like that of this petitioner, where the

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*Selective Service System, *Legal Aspects of Selective Service* (1963) p. 42.

Local Board decided that he "does not meet the criteria for C.O." This was a determination on the merits and, hence, under Selective Service Regulations, amounted to a reopening of petitioner's classification. Relying upon *Miller v. United States*, 388 F.2d 973 (9 Cir. 1967), the court below held that this entitled petitioner to administrative review of the Local Board's action. But, since the Local Board had erroneously characterized its action as a refusal to reopen, petitioner was denied the right to appeal.

In its first decision the Court of Appeals held that this denial of procedural due process invalidated the conviction, making no distinction between this case, where the C.O. claim was not made until two months after the refusal to submit to induction, and *Miller v. United States, supra*, where the late C.O. claim was made prior to induction. After rehearing this distinction was found to be critical, the court holding that procedural defects in handling post-induction-date C.O. claims cannot be interposed as a valid defense to the crime of refusing to submit to induction.

Courts in other circuits have taken a different view of the Selective Service System's power to act after the induction date. In *United States v. Shermeister*, 425 F.2d 1362 (7 Cir. 1970), the registrant filed Form 150 after receiving an induction order. The Board considered the Form and refused to reopen. The day before the registrant's postponed induction date, he filed a second Form 150, substantially similar to the first one. The clerk was unable to reach the members of the Local Board prior to the registrant's refusal of induction. Reversing the conviction for denial of appellant's right to procedural due process, the court spoke as follows:

We disregard as patently insufficient to satisfy due process the action of the clerk of the board and the state director in what they seem to have regarded as an emergency created by the request made on the day prior to induction. In view of Section 1625.2, there was no need for the clerk to give such emergency treatment to the defendant's request. That Section will allow even post-induction day consideration of these requests. The wisdom of the Section is clear; it recognizes that registrants should not be allowed to delay the induction process by continually filing late requests for reconsideration, and that board members cannot devote all their time to suit either the conveniences or lapses of registrants by always being available for last-minute meetings. On the other hand, Section 1625.2, by providing for proper consideration of these late requests, recognizes the law's concern for the sanctity of a registrant's conscience, and the fundamental proposition that a defendant in a federal criminal case must not only be proven guilty beyond a reasonable doubt but in full compliance with the due process clause of the Fifth Amendment.

In an earlier case in the Seventh Circuit, *United States v. Shields*, 416 F.2d 935 (7 Cir. 1969), the defendant attempted to raise his claim of selective conscientious objection for the first time at trial on the criminal charge. In a per curiam decision, the judgment was reversed and the District Court directed on remand to return the file to the Local Board to consider the C.O. claim. The court saw no obstacle to administrative review even after trial and conviction.

Relying on the *Shermeister* case, the District Court in *United States v. Johnson*, 3 SSLR 3335 (E.D. Wis. 1970) (not officially reported) granted a motion for acquittal where the C.O. claim had first been made after the defendant had refused induction and the local board had refused to consider the claim. In *United States v. Grochowski*, 3 SSLR 3380 (E.D. Wis. 1970) (not officially reported) the application for C.O. status was made after indictment. The court remanded the case to the local board for consideration of the claim, since to hold otherwise might result in finding an innocent man guilty without even giving him a chance to be heard.

In a District Court case from the Eighth Circuit, *United States v. Hansen*, 314 F. Supp. 91 (D. Minn. 1969), the C.O. claim was first made after indictment and was not considered by the local board. The court found the defendant not guilty and dismissed the case, without prejudice however to the local board's right to take further steps in reference to the defendant's classification.

In *United States v. Hinch*, 292 F. Supp. 696 (W.D. Mo. 1968), defendant asked for Form 150 three days before induction but failed to return the completed form until after he had refused induction. The local board refused to reopen on the theory that the claim was untimely. The defendant was acquitted. A similar result was reached in *United States v. Kerwin*, 313 F. Supp. 781 (D. Minn. 1970), where the local board gave defendant a "courtesy interview" which the court found amounted to a reopening, and then denied him a right to appeal.

At the time this case was reargued in the court below, the Ninth Circuit decision in *Lloyd v. United*

States, 431 F.2d 160 (9 Cir. 1970) was not available to counsel. In view of the heavy reliance by the Government in the court below on Ninth Circuit cases which, it argued, supported its position, this case is of particular significance. In *Lloyd*, one of the issues involved was whether the State Director had the power, after indictment, to direct a reopening by the local board to consider a C.O. claim which had not been made earlier because Lloyd, a Muslim, erroneously believed he could not meet the requirements. On appeal, the court held that the State Director had the power under 32 C.F.R. 1625.3(a) to direct reopening, with no time limitation. The court continued as follows:

> Evidence that the State Director's authority continues even after the registrant has refused induction is provided by 32 C.F.R. §1625.14 which provides that
>
> > "[t]he reopening of the classification of a registrant by the local board shall cancel any Order To Report for Induction . . . which may have been issued to the registrant, except that if the registrant has failed to comply with either of those orders, the reopening of his classification thereafter by the local board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the order with which he failed to comply."
>
> Thus it is clear that an order to reopen a registrant's classification will cancel an order to report for induction (with the two exceptions noted above, neither of which is relevant in this case) even if the registrant has refused to step forward. This, we think, is consistent with the nature of the power

conferred on the State Director. It is a dispensing power, akin to, although not as broad as, the pardoning power. We find that it was within the power of the State Director to order the Local Board to reopen Lloyd's classification even though he was under indictment for failure to comply with an order to report for induction.

The court then vacated the judgment pending an exercise by the State Director of his discretion to reopen. If the State Director directed a reopening, the action was to be dismissed. If not, the guilty verdict was to stand.

The holding in *Lloyd* would seem to be in direct conflict with the decision of the court below. The only difference in the fact situation is that here the State Director had already exercised his discretion to order a reopening, whereas in *Lloyd*, the question was his power to reopen. Once reopened, 32 C.F.R. 1625.14, on its face, cancels the induction order. The Ninth and Third Circuits are in direct conflict as to whether this affords a defense to the criminal prosecution.

The concept of equal protection requires uniform treatment of persons standing in the same relationship to their Government. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). This Court should review to determine whether it is a denial of equal protection to permit delinquent registrants to enter military service after they have failed to comply with the law and to deny a delinquent C.O. registrant the opportunity to qualify for and accept alternative service.

2. This case also raises a question of basic procedural fairness as to the process by which petitioner

was called for induction. Evidence was offered at trial as to deviations from the law and the regulations, which petitioner contended hastened his induction. The question of whether such proof shifts the burden to the government to prove petitioner was called in order is one of general importance which has not been previously been passed upon by this court.

In its original disposition of this case, the Court of Appeals did not reach the order of call question. After reargument, the Court reviewed the record and sustained the trial court's disposition of the matter without discussion of the merits. Reference to the lower court opinion is thus necessary to determine the basis of the holding.

Regulation 1631.7a, governing order of call, in effect at the time this petitioner was called, provided that registrants who were non-volunteers should be selected and called "in order of their dates of birth with the oldest being selected first". 32 C.F.R. 1631.7a. On March 25, 1968, when this petitioner was called for induction, he was only 19 years old. In *Gutknecht v. United States*, 396 U.S. 882 (1970), this Court considered the case of a 20 year old registrant who was called in January, 1968 as a delinquent. Therein, the Department of Justice conceded it was unlikely Gutknecht would have been called "at such an early age" if he had not been classified as delinquent. Justice Douglas, speaking for the Court, referred to the importance of being called in order as follows:

> Deferment of the order of call may be the bestowal of great benefits; and its acceleration may be extremely punitive. As already indicated, the statu-

> tory policy is the selection of persons for training and service "in an impartial manner." 50 USC App §455(a)(1).

Justice Stewart, concurring, referred to the right of a registrant to complain that he has been called out of order as follows:

> That the petitioner might eventually have been called — by no means a certainty, given the variations in draft calls and the possibility that he might subsequently have qualified for a deferment or exemption — does not mean he cannot complain that he was ordered to report for induction earlier than he should have been.

The Circuits are in agreement that compliance with the order of call regulations is a necessary element in the government's case. The presumption of regularity is sufficient to make out this element of the offense in the absence of any evidence to the contrary. *Greer v. United States*, 378 F.2d 931 (5 Cir. 1967); *Yates v. United States*, 404 F.2d 462 (1 Cir. 1968) reh. denied 407 F.2d 50, cert. den. 395 U.S. 925.

In *United States v. Baker*, 416 F.2d 202, 204-205 (9 Cir. 1969), the importance of compliance with order of call procedures was referred to as follows:

> Manifestly, the order of call affects registrant's substantial rights. Indeed Congress has regarded the matter as so vital to the fairness of the operation of the Selective Service System that it enacted legislation prohibiting an administrative change of the present method of determining the relative order of induction within the specified age groups. 50 U.S.C. App. Section 455(a)(2). *And we hold*

that a strict compliance is essential to the validity of an order to report for induction. (Emphasis supplied.)

Petitioner raised the issue of call in advance of trial by subpoena duces tecum to compel the production of records pertaining to order of call. On trial, Major Evans, Manpower Officer in Pennsylvania Selective Service System Headquarters testified he had reviewed the files, classification records and minutes of the meetings of the Local Board and found no registrant then available for service and older than the petitioner who had not been called (Trial Court opinion, 9a). This review, however, was made within the terms of practices of the Pennsylvania Selective Service System and the Local Board which petitioner contended violated the terms of the statute and of the regulations.

The statutory provision for Quotas and Calls appears in the appendix (9a-10a). It requires credit to be given in determining the quota for each state and subdivision thereof (i.e., local board area) for men in the Armed Forces at the time the quota is determined. The statute further requires that after Local Board quotas have been fixed, credit should be given in filling such quotas for residents of the local board area who become members of the Armed Forces. Major Evans testified that while registrants who volunteer through their local boards are counted on the board's quota, those who enlist under the Armed Forces' recruitment programs are *not* credited. Selective Service System rationale for determining quotas and calls on this basis is that the State and the local board receive indirect credit for those in the Armed Forces in that those al-

ready in service are not available and hence cannot be called.

The trial court dealt with this question by holding that while this method of determining quotas and calls expedites the call-up of registrants of certain boards in Pennsylvania, it also has the effect of delaying the call-up of other registrants. Under these circumstances, the burden of proof should have shifted to the Government to prove this petitioner's induction had not been accelerated by the variance from the statutory and regulatory provisions. Instead, the trial court concluded that even if the computation of Local Board 10's quota was extra-legal, it worked no demonstrable prejudice to the petitioner.

Granting this petition for certiorari would afford an opportunity to determine whether the Selective Service System is administering the statute in accordance with Congressional intent, which clearly was to equalize the burden of supplying men for the Armed Forces. A system which does not allow direct credit against the local board's quota for men who enlist obviously places a heavier burden upon those areas where enlistments are greatest.

The question presented herein is not mooted by the change in the process of determining order of call under the lottery system. The statutory provision for equalizing quotas and calls has not been repealed, and the manner in which the Selective Service System applies the law implicates due process and equal protection questions of importance.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff v. GREGORY PAUL NOONAN, Defendant.	Criminal Action No. 68-149

Opinion

MILLER, D.J.

Defendant, Gregory Paul Noonan, is charged by a Grand Jury Indictment with violating Section 12 of the Military Service Act, 50 U.S.C. App. §462, in that as a registrant of Local Board No. 10 [hereinafter "Board"] at Pittsburgh, Pennsylvania, he did evade and refuse service in the armed forces of the United States by knowingly failing, neglecting, and refusing to submit to induction, as directed by the Board and as required of him under the Act, and the rules, regulations, and directives issued pursuant thereto.

Defendant was born on March 31, 1948. He registered with the Board and submitted a Classification Questionnaire on May 16, 1966. On January 1, 1967, he was classified II-S on the basis of his status as a student at Pennsylvania State University. During the fall semester of 1967, he withdrew from the University; and on December 14, 1967, he was reclassified as I-A.[1]

1. On December 19, 1967, defendant again requested a student deferment. He testified that he did so in expectation of re-entering the University for the spring semester. He was subsequently denied readmission, which he attributes to a University rule requiring a full semester's absence following a withdrawal.

Opinion.

On February 1, 1968, the Board directed defendant to report for physical examination on February 20, 1968. Defendant was found fully acceptable for induction. On March 5, 1968, the Board directed defendant to report for induction on March 25, 1968. He reported as directed, but refused to take one step forward.

On May 24, 1968, defendant went to the Board and requested and received an SSS Form 150 to claim a conscientious objector's classification. Although it indicated, "THIS FORM MUST BE RETURNED ON OR BEFORE JUNE 5, 1968," it was not submitted until September 20, 1968. On or about September 30, 1968, the State Director's Office by letter advised the Chairman of the Board:

" * * * *

"The local board should consider the SSS Form 150 filed by the registrant on September 20, 1968.

"Upon consideration of the registrant's claim of conscientious objection, if the board first determines, according to Section 1625.2 of the regulations, that there has been a change in the registrant's status resulting from circumstances over which he had no control, then it may reopen and consider anew the classification of the registrant. However, if the board finds there has been no change in the registrant's status resulting from circumstances over which he had no control, but believes that the registrant's claim of conscientious objection has merit, the board may reopen and consider anew according to Section 1625.3 and can consider this letter as authority to so reopen and consider anew.

"If however, the local board finds there has been no change in the registrant's status resulting from circumstances over which he had no control, and he does not meet the criteria for conscientious objection, then, the local board need not reopen and consider his classification anew. The action of the local board should be entered on Page 8 of SSS Form 100 and the registrant notified by letter."

An interview was conducted by the Board on October 1, 1968. As its minute indicates: "The Board Members considered all evidence submitted and determined that there was no change in status over which the registrant had no control, therefore did not reopen the classification." An attached sheet stated: "[Registrant] does not meet criteria for C.O." Defendant was notified accordingly on October 2, 1968.

On October 9, 1968, defendant wrote the Board: "I would like to appeal the decision to not grant me conscientious objector status." On October 10, 1968, the Executive Secretary responded:

" • • •

"As the interview was not a personal appearance you were informed that the Board Members did not reopen the classification, and a request for an appeal must be filed within the time allotted on Notice of Classification Form SSS 110, and SSS form [sic] 217.

"An interview does not constitute a reopening of classification."

The Board's classification of defendant may be overturned only if it lacks a basis in fact. *Estep v. United States*, 327 U.S. 114, 66 S. Ct. 423, 90 L. Ed. 567

(1946); *Witmer v. United States*, 348 U.S. 375, 75 S. Ct. 392, 99 L. Ed. 428 (1955). In evaluating the genuineness of a claim for an I-O classification, the belatedness of the claim is a proper factor to be considered by the Board. *United States v. Gearey*, 379 F. 2d 915 (2 Cir. 1967), cert. den. 389 U.S. 959, 88 S. Ct. 335, 19 L. Ed. 2d 368 (1967); *United States v. Helm*, 386 F. 2d 434 (4 Cir. 1967), cert. den. 390 U.S. 958, 88 S. Ct. 1045, 19 L. Ed. 2d 1153 (1968); *United States v. Taylor*, 351 F. 2d 228 (6 Cir. 1965); *Porter v. United States*, 334 F. 2d 792 (7 Cir. 1964); *Parrott v. United States*, 370 F. 2d 388 (9 Cir. 1966), cert. den. sub nom. *Lawrence v. United States*, 387 U.S. 908, 87 S. Ct. 1690, 18 L. Ed. 2d 625 (1967); *Thompson v. United States*, 380 F. 2d 86 (10 Cir. 1967). The Court finds a factual basis for the Board's classification of defendant.

The Government having established the elements of the offense beyond a reasonable doubt, it remains to review the various defenses asserted by defendant.

Defendant cites *United States v. Federspiel*, 1 SSLR 3042 (N.D. Ohio 1968) for the proposition that the Board's "refusing to re-open, consider the case anew, and reclassifying him" constituted a lack of due process. To the extent the Opinion of District Judge Lambros, orally delivered from the bench, admits of such interpretation, we decline to follow it.[2] In effect, such a holding would substantially deny effect to Section 1625.2 of the Selective Service Regulations which in relevant part provides:

---

2. In *United States v. Stoppelman*, 406 F. 2d 127, 132n (1 Cir. 1969), the Court alluded to the opinion in *Federspiel* and stated:". . . we do not find it persuasive."

"The local board may reopen and consider anew the classification of a registrant . . . provided . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant has no control." 32 C.F.R. §1625.2

This regulation has been sustained as a reasonable limitation on the right to make a conscientious objector claim. *United States v. Gearey*, 368 F. 2d 144, 149 (2 Cir. 1966). The Board having found no change in registrant's status resulting from circumstances over which the registrant had no control, there was neither duty nor authorization to reopen and reclassify anew defendant's classification.

Defendant also seeks to bring his case within the ambit of *Miller v. United States*, 388 F. 2d 973 (9 Cir. 1967), where the registrant was ordered to report for induction one day before he filed a Form 150. The registrant's request for a postponement of induction was referred by the local board to the State Director, who authorized the local board to proceed as follows:

"It is considered desirable that the local board have an opportunity to consider all information received since the date of the most recent classification. * * *

"If upon review the local board members are of the opinion that the evidence supports a change of classification, authority is extended to reopen the same and consider anew. * * * Should the local

board consider that the record does not justify deferment, it need not reopen classification. In this connection attention is invited to Section 1625.4 SSR." (Ellipsis in original) 388 F. 2d 974

Without formally reopening, the local board reviewed the registrant's Form 150, and determined that the registrant was not entitled to a conscientious objector classification. Thereafter, the registrant was convicted for refusing induction.

Reversing, the Court of Appeals construed the State Director's letter as an exercise of "his implicit power" to order a review as authorized by Section 1625.3(a) of the Regulations,[3] unencumbered by the proviso of Section 1625.2, *supra*. It held that, presentation of "facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification," 32 C.F.R. §1625.2(1), present prima facie evidence requiring reopening and that the subsequent failure to accord rights of appearance and appeal because of the failure to reopen constituted a denial of due process. Cf. *Petersen v. Clark*, 289 F. Supp. 949 (N.D. Cal. 1968).

In the case at bar, there was no mandatory "request" to the Board by the State Director to reopen as specified in Section 1625.3 of the Regulations. Instead, the Board was instructed to reopen only on a finding either that there had been a change of circum-

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3. "The local board shall reopen and consider anew the classification of a registrant upon the request of the State Director . . . and upon receipt of such request shall immediately cancel any Order to Report for Induction . . . which may have been issued to the registrant." 32 C. F. R. §1625.3(a).

stance or that defendant met the criteria for conscientious objection. The Board found neither and refused to reopen.

Although the State Director's and the Board's disposition of the matter foreclosed review under Section 1626.1 et seq. of the Regulations, we perceive no prejudice to defendant. A request by the State Director to reopen and consider anew, pursuant to Section 1625.3 of the Regulations, results from the exercises of his own sound discretion. In the case at bar, the State Director, in effect, chose not to exercise his discretion to mandate a reopening. Instead, he elected to permit the Board to determine whether the Form 150 raised matters, beyond the scope of the proviso of Section 1625.2, for the determination of which reopening and considering anew would be an appropriate remedy. Whether or not this delegation of responsibility constituted sound practice we need not decide. Clearly, the State Director did not feel moved, with the record available to him, to order a reopening. Had he advised the Board to process defendant's Form 150 within the narrow scope of the proviso to Section 1625.2, thus inferentially refusing to mandate reopening under Section 1625.3, we would not have here reviewed his failure to grant a broader reexamination. That the State Director authorized a reopening only upon the Board's adjudication of threshold questions can hardly be said to infringe any rights enjoyed by defendant.

Parenthetically, the procedure adopted by the State Director afforded defendant a greater opportunity to vindicate the rights asserted than he would have enjoyed, if the State Director had merely refused to request a reopening, rather than authorizing a reopening

upon the Board's evaluation of the claim. Defendant's claims were fortified by the assumed value of a personal appearance before the Board; the State Director acts without the benefit of such an appearance. However irregular the policy adopted by the State Director may have been, it did not contravene any right due to defendant.

Defendant also contends that the order to report for induction was improper in that it violated the order of call. Section 1631.7 of the Regulations, in part, provides:

> "When a call is placed without designation of age group or groups, each local board . . . shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and have been found acceptable for service . . . ." 32 C.F.R. §1631.7

The same Regulation also provides:

> ". . . Such registrants . . . shall be selected and ordered to report for induction in the following order:
>
> * * *
>
> "(3) Nonvolunteers who have attained the age of 19 years and have no[t] attained the age of 26 years . . . in the order of their dates of birth with the oldest being selected first." Id.

Major James H. Evans, manpower officer in the Pennsylvania headquarters of the Selective Service System, testified as follows: He had reviewed the files, classification records, and minutes of the Board's meetings. (T. 99) He found no registrant who was then

available for service and older than defendant who had not been called. (T. 99, 100) He expressed the opinion that defendant was called for induction in order of turn. (T.96) Defendant has failed to show any invalidity in the order of call.[4]

Defendant asserts two grounds for acquittal based on alleged violations by the Selective Service System of 50 U.S.C. App. §455(b), which provides:

> "Quotas of men to be inducted for training and service under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix] shall be determined for each State, Territory, possession, and the District of Columbia, and for subdivisions thereof, on the basis of the actual number of men in the several States, Territories, possessions, and the District of Columbia, and the subdivisions thereof, who are liable for such training and service but

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4. Defendant sought to expand his "order of call" argument by questioning the Board's failure to call for physical examination various registrants older than defendant. Defendant's counsel, examining Mary S. Schremmer, field supervisor of Selective Service System Region Six, reviewed the status of three registrants who were older than defendant but who had not been called for physical examination on the basis of a Form 102. (T. 114, et seq.)

It appears to be the Board's practice to defer the physical examination of registrants who have appearances and appeals pending. (T. 115) This practice apparently does not comport with Section 1628.11(b) of the Regulations, 32 C.F.R. §1628.11(b). However, in each instance reviewed by Mrs. Schremmer, the registrant was ultimately deferred. Since the deferments precluded these registrants inductions, the failure to administer a physical examination in no way hastened defendant's induction.

> who are not deferred after classification, except that credits shall be given in fixing such quotas for residents of such subdivisions who are in the armed forces of the United States on the date fixed for determining such quotas. After such quotas are fixed, credits shall be given in filling such quotas for residents of such subdivisions who subsequently become members of such forces. Until the actual numbers necessary for determining the quotas are known, the quotas may be based on estimates, and subsequent adjustments therein shall be made when such actual numbers are known. All computations under this subsection shall be made in accordance with such rules and regulations as the President may prescribe." 50 U.S.C. App. §455.

Regulations have been promulgated to enforce this provision. 32 C.F.R. §1631.1, et seq. Accordingly, the Armed Forces are required to notify each State Director of Selective Service of the entry into and departure from active service of each person resident in the State Director's jurisdiction. 32 C.F.R. §1631.2(b), (c). "Periodically," each State Director informs the Director of Selective Service regarding the number of entries and departures from active service. 32 C.F.R. §1631.2(d). On the basis of this information, the Director determines the quotas, credits, and debits for the nation and for each state. 32 C.F.R. §1631.2(a). This data also provides the basis of the State Director's computation of the debits and credits for each local board in his state. 32 C.F.R. §1631.2(d).

Defendant asserts that the State Director has disregarded the mandate of Section 1631.2 in allocating the debits and credits for each local board in Pennsylvania,

by failing to compute those residents who have been inducted into the Armed Services through the Armed Services' own recruitment programs.[5]

Failure to accord a registrant rights accorded by the Act and the Regulations invalidates the action of the draft board only when irregularity results in prejudice to the registrant. *United States v. Stiles*, 169 F. 2d 455 (3 Cir. 1948); *United States v. Lawson*, 337 F. 2d 800 (3 Cir. 1964), cert den. 380 U.S. 919, 85 S. Ct. 913, 13 L. Ed. 2d 804 (1965); *United States v. Sturgis*, 342 F. 2d 328 (3 Cir. 1965), cert den. 382 U.S. 879, 86 S. Ct. 164, 15 L. Ed. 2d 120 (1965); *United States v. Spiro*, 384 F. 2d 159 (3 Cir. 1967), cert. den. 390 U.S. 956, 88 S. Ct. 1028, 19 L. Ed. 2d 1151 (1968); *Martin v. United States*, 190 F. 2d 775 (4 Cir. 1951), cert. den. 342 U.S. 872, 72 S. Ct. 115, 96 L. Ed. 656 (1951); *Tyrell v. United States*, 200 F. 2d 8 (9 Cir. 1952), cert. den. 345 U.S. 910, 73 S. Ct. 646, 97 L. Ed. 1346 (1953); *Knox v. United States*, 200 F. 2d 398 (9 Cir. 1952).

With the exception of the First Circuit, *Steele v. United States*, 240 F. 2d 142 (1 Cir. 1956), the Courts of Appeals which have reviewed the question have imposed the burden of proving prejudice on the party asserting it. *United States v. Sturgis, supra; United States v. Spiro, supra; Rowton v. United States*, 229 F. 2d 421 (6 Cir. 1956), cert. den. 351 U.S. 930 76 S. Ct.

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5. Defendant does not question the State Director's compliance with the remaining provisions of Section 1631.2. Therefore, it is not suggested that the State Director has failed to report any credits or debits pertaining to Pennsylvania. Accordingly, it is not contended that Pennsylvania's quota is higher than is envisioned by the statutory and regulatory procedures.

788, 100 L. Ed. 1460 (1956); *United States v. Manns*, 135 F. Supp. 624 (N.D. Ill. 1955), aff'd 232 F. 2d 709 (7 Cir. 1956); *Bradshaw v. United States*, 242 F. 2d 180 (10 Cir. 1957). Accord: *United States v. Camp*, 285 F. Supp. 400 (N.D. Ga. 1967).

It is obvious that, while the State Director's failure to compute servicemen inducted through recruitment expedites the call-up of registrants of certain local boards in Pennsylvania, it has the effect of delaying the call-up of an equal number of registrants of other local boards in the Commonwealth. The record before us is devoid of any evidence suggesting that defendant's induction was hastened rather than delayed by the State Director's variance from the statutory and regulatory provisions. Assuming *arguendo* that the State Director's computation of Local Board No. 10's quota was extra-legal, we conclude that it worked no demonstrable prejudice to defendant.

Defendant also contends that there were older registrants classified I-A who, since they had not been physically examined, were not called for induction. He argues that this subjected defendant to "earlier call." [Defendant's Supplemental Brief, p. 3] He argues that this contravenes 50 U.S.C. App. §455(b).

The obvious answer to this contention is that 50 U.S.C. App. §455(b) is addressed to apportioning the "obligations and privileges," 50 U.S.C. App. §451(c), among the states and subdivisions thereof. Assuming the propriety of the quota itself we read nothing in the statutory provision which enjoins the induction of a registrant, while there are older registrants classified I-A who had not been examined.

Lastly, defendant has raised issues, purportedly of a Constitutional nature, so lacking in merit as to require no discussion in this Opinion.

Defendant's Motion for Acquittal must be denied.

The Court finds the defendant guilty as indicted.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18,031

UNITED STATES OF AMERICA
v.
GREGORY PAUL NOONAN, *Appellant*

(D. C. Criminal No. 68-149)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued January 6, 1970
Before BIGGS, ALDISERT and STAHL,
Circuit Judges

Reargued September 28, 1970
Before BIGGS, VAN DUSEN and ALDISERT,
Circuit Judges

Opinion of the Court
(Filed November 18, 1970)

ALDISERT, CIRCUIT JUDGE.

Following the first argument of this appeal from a conviction of refusal to submit to induction, we decided, based on the *de facto* reopening theory of *Miller v. United States*, 388 F.2d 973 (9 Cir. 1967), that appellant was entitled to administrative review of the local

board's purported refusal to reopen his classification. In a petition for reargument, the government conceded the vitality of *Miller* but urged its inapplicability as a defense to this criminal prosecution because the registrant did not seek a reopening of his classification until almost sixty days after the crime was committed. We granted reargument before the panel[1] to consider the government's contention.

Initially classified II-S, based on his status as a college student, appellant was reclassified I-A following his withdrawal from school in the fall of 1967. Shortly thereafter he underwent physical examination and was found acceptable for military service. He was then ordered to report for induction on March 28, 1968. He appeared at the induction center but refused induction.

On May 25, 1968, appellant requested and later received an SSS Form 150 (Conscientious Objector) from his local board, which he filed with the board some four months later on September 20, 1968. In the interim, on June 26, 1968, a grand jury returned an indictment against him, charging a violation of the Military Selective Service Act of 1967, 50 App. U.S.C.A. §462(a).

Confronted with his belated claim for exemption, the local board sought advice from the Pennsylvania State Selective Service Director, asking what, if any, consideration should be given the claim. The director wrote that the local board "may reopen and consider

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1. Judge Stahl participated in the original decision, but died prior to the reargument. Judge Van Dusen was designated to sit as the third panel member.

anew" the claim "without regard to the fact that he has been indicted and without the aura of criminality."[2]

After receiving the requested instructions, the local board summoned appellant to appear for a personal interview on October 1, 1968. The minutes of the board's subsequent meeting establish that, in accordance with the directions from state headquarters, the board considered the merits of appellant's claim. The board determined (1) that there was "no change in status," (2) that his "claim does not have merit" and (3) that he "does not meet the criteria for C.O." Appellant was then informed that the board had determined "there was no change in your status over which you had no control, [and] therefore, did not reopen your classification."

Under the reasoning of *Miller v. United States*, *supra*, a court must look to the substance and not the

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2. That these directions permitted the local board to reopen appellant's classification even in the absence of "changed circumstances" is significant, for regulation 32 C.F.R. §1625.2 provides that a classification "shall not be reopened after the local board has mailed . . . an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." See *Scott v. Commanding Officer*, ——F.2d—— (3 Cir. 1970). The permission from state headquarters for the board to reopen if it believed that the "claim of conscientious objection has merit" was thus an express extension of the local board's authority. The state director has the authority to request a reopening, and the local board "shall reopen and consider anew the classification" when such request is made, 32 C.F.R. §1625.3. By implication, the state director is also empowered to authorize, as well as request, a reopening.

form of the board's proceedings. Thus, board action which amounts to a *de facto* reopening of the classification under 32 C.F.R. §1625.11 entitles the registrant to an appeal to the state board even though the local board purports to have refused a reopening.[3] In *Miller* the denial of the appeal was held to be a sufficient ground for reversing the conviction.

The government argues that there is a crucial distinction between the facts in *Miller* and those in the case before us — a distinction so fundamental as to make the difference between a valid legal defense in *Miller* and a legal irrelevance here: (1) Miller's request for the SSS Form 150 was made one day after he received notice that he was to be inducted at a future date, and the proceedings to reopen his classification were initiated before the date on which the alleged crime of refusing induction was committed; (2) appellant's request was not made until the induction day had long passed; his request for Form SSS 150 was not submitted until some sixty days after the commission of the crime.

Attaching critical significance to the timeliness of the institution of the reopening proceedings, the government urges that any defect in a selective service proceeding which occurred subsequent to appellant's refusal to submit to induction is not relevant to the issue whether a crime was committed on the day of the scheduled induction. Hence any subsequent selective service procedural infirmity cannot be interposed as a valid defense to the crime charged.

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3. See United States v. Turner, 421 F.2d 1251, 1252-53, and cases cited therein.

Although the government's position has been endorsed by a formidable array of precedents on the First, Sixth, Seventh, Eighth and Ninth Circuits,[4] appellant would have us construe 32 C.F.R. §1625.14 to mean that any reopening of a classification by a local board after an induction day has come and gone, ignored by the registrant, automatically and retroactively cancels the induction order, voids any violation of the order, and places the registrant in the same position as if an order to report and submit had not been issued. Thus, appellant contends that the *de facto* reopening of his classification which occurred in October, 1968 had the effect of nullifying his March, 1968 induction order and vitiating his violation thereof.

We now turn to 32 C.F.R. §1625.14:

> Cancellation of Order to Report for Induction or for Civilian Work by Reopening of Classification. The reopening of the classification of a registrant by the local board shall cancel any Order to Report for Induction (SSS Form 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form 153) which may have been issued to the registrant, *except that if the registrant has failed to comply with either of those orders, the reopening*

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4. United States v. Stoppelman,——F.2d——(1 Cir. 1970); United States v. Powers, 413 F.2d 835 (1 Cir. 1969); United States v. Swierenga,——F.2d——(6 Cir. 1970); United States v. Smoger, 411 F.2d 501 (7 Cir. 1969); United States v. Seeverts, —— F.2d —— (8 Cir. 1970); United States v. Palmer, 401 F.2d 226 (9 Cir. 19..); Blades v. United States, 407 F.2d 1397 (9 Cir. 1969); Straight v. United States, 413 F.2d 263 (9 Cir. 1969), United States v. Blakely, 424 F.2d 1043 (9 Cir. 1970).

of the classification thereafter by the Local Board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the Order with which he failed to comply. (Emphasis supplied.)

From this follows what appellant calls the "compellable inference" that reopenings for all other classifications automatically cancel prior orders with which there has been no compliance. Clearly, there is no explicit statement in this regulation that a subsequent reopening will cancel orders with which there has been non-compliance.

We find neither logical nor statutory support for appellant's conclusion. Apparently the purpose of the specific reference to Classes IV-C and V-A is an explicit warning that any registrant who acquires alien or over-age status after the date of the scheduled induction may obtain no relief by seeking a reopening of his classification. To apply appellant's reasoning would be to conclude that all reopenings, except those which contemplate a IV-C or V-A classification, automatically cancel induction orders which have been violated. Other than the obvious havoc this procedure would wreak in the selective service system, this construction of §1625.14 would mean that a subsequent reopening of a classification would have the legal effect of quashing an indictment before trial, or of arresting a conviction and perhaps setting aside a decision of the court of appeals, or, indeed, of the United States Supreme Court. This regulation simply does not invest local boards with such prerogatives of pardoning power.

Accordingly, we hold that appellant cannot convert his belated attempt for a reopening of his classification—an attempt which he did not undertake until May

26, 1968—into a legal defense to the crime he committed two months earlier on March 28, 1968.

Appellant also contends that he was denied due process because the local board's induction order called him out of turn. This allegation was exhaustively treated by the district court, sitting without a jury. Our independent review of the testimony, and our study of the trial court's findings, and of the analysis duly set forth in its memorandum opinion convinces us that the district court did not err.

The judgment of conviction will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Military Selective Service Act of 1967

(50 U.S.C. App. 462)

Sec. 12. *Penalties.*—(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant

thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

Military Selective Service Act of 1967

(50 U.S.C. App. 455)

§5 (b) Quotas of men to be inducted for training and service under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix] shall be determined for each State, Territory, possession, and the District of Columbia, and for subdivisions thereof, on the basis of the actual number of men in the several States, Territories, possessions, and the District of Columbia, and the subdivisions thereof, who are liable for such training and service but who are not deferred after classification, except that *credits shall be given in fixing such quotas for residents of such subdivisions who are in the armed forces of the United States* on the date fixed for determining such quotas. After such quotas are fixed, *credits shall be given in filling such quotas for residents of such subdivisions who subsequnetly become members of such forces.* Until the actual numbers necessary for determining the quotas are known, the quotas may be based on estimates, and subsequent adjustments therein shall be made when such actual numbers are known. All computations under this subsection shall be made in accordance with such rules and regulations as the President may prescribe." (Emphasis supplied.)

Selective Service Regulations

(32 C.F.R. 1625)

1625.2 *When Registrant's Classification May Be Reopened and Considered Anew.*—The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

1625.3 *When Registrant's Classification Shall Be Reopened and Considered Anew.*—(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immedi-

ately cancel any Order to Report for Induction (SSS Form 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form 153) which may have been issued to the registrant.